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No. 91-707

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOHN B. LENNES, JR., COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, STATE OF MINNESOTA,

-and-

MINNESOTA MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Petitioners,

vs.

BOISE CASCADE CORPORATION, A DELAWARE CORPORATION, BE&K CONSTRUCTION COMPANY, A DELAWARE CORPORATION, CHARLES L. LEE, RELCO UNISYSTEMS CORPORATION, A MINNESOTA CORPORATION, FORREST DAHMES, MID-STATES MECHANICAL SERVICES, INC., A MINNESOTA CORPORATION AND KRISTINE SOUTHARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Employee Retirement Income Security Act ("ERISA") preempt a state-mandated ratio of apprentices to journeymen for apprenticeship training programs which are employee welfare benefit plans under ERISA?

2. Does ERISA's "savings clause" protect from preemption a ratio of apprentices to journeymen promulgated as a general state regulation applied to all ERISA apprenticeship training plans?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Summary of Argument 5

Reasons for Denying the Writ 7

A. The Supreme Court Has Articulated a Clear Standard for ERISA Preemption. 7

B. The Circuit Courts Have Uniformly Adhered to the Supreme Court Standards of Broad ERISA Preemption. 12

C. The Eighth Circuit Properly Applied Well-Settled ERISA Preemption Standards to the Preempt Rule. 16

D. Petitioners Have Mischaracterized the Legal Standards of ERISA Preemption, and Have Failed to Demonstrate Any Justification for Granting the Petition. 19

Contents

Page

1. The Eighth Circuit's Decision Does Not Destroy the State's Regulatory Authority by Improperly Limiting the Exercise of Traditional Police Power. 20

2. There is No Regulatory Black Hole. 22

3. Petitioners Have Misstated the Law and this Court's Decisions in an Attempt to Create a New Legal Structure for ERISA Preemption. 24

E. The Rule Is Not "Saved" by Either ERISA or the National Apprenticeship Act. 26

Conclusion 30

TABLE OF CITATIONS

Cases Cited:

Alessi v. Raybestos-Manhattan Inc., 451 U.S. 504 (1981) 8, 20, 21, 23

Authier v. Ginsburg, 757 F.2d 796 (6th Cir. 1985), cert. denied, 474 U.S. 888 (1985) 13

Baxter v. Lynn, 886 F.2d 182 (8th Cir. 1989) 8, 13

Blue Cross & Blue Shield v. Dept. of Banking, 791 F.2d 1501 (11th Cir. 1986) 12

Caterpillar Inc. v. Williams, 482 U.S. 386 (1987) 8

Contents

Page

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 27

Clark v. Coats & Clark, Inc., 865 F.2d 1237 (11th Cir. 1989) 13

Delta Air Lines v. August, 450 U.S. 347 (1981) 27

Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 988 (1981) 13

Duigan v. United States, 274 U.S. 195 (1927) 27

Electrical Joint Apprentice Committee v. McDonald, Nos. 90-15095, 90-15395, 1991 WL 227779 (9th Cir. Nov. 8, 1991) 15, 28, 29

FMC Corp. v Holliday, 885 F.2d 79 (3rd Cir. 1989), vacated on other grounds, 111 S. Ct. 403 (1990) 8, 10, 11, 13, 15, 18

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 17, 24, 25, 26

Gahn v. Allstate Life Ins. Co., 926 F.2d 1449 (5th Cir. 1991) 12

General Electric Co. v. New York Dept. of Labor, 891 F.2d 25 (2d Cir. 1989), cert. denied, 110 S. Ct. 2603 (1990) 8, 13, 14

Gibson v. Prudential Ins. Co. of America, 915 F.2d 414 (9th Cir. 1990) 13

Contents

Page

Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), aff'd mem., 477 U.S. 901 (1986) 12, 14

GranFinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989) 27

Holland v. Burlington Indust., Inc., 772 F.2d 1140 (4th Cir. 1985), aff'd mem., 477 U.S. 901 (1986) and cert. denied, 477 U.S. 903 (1986) 14

Howard v. Gleason Corp., 901 F.2d 1154 (2nd Cir. 1990) 13

Hydrostorage Inc. v. North California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied, 111 S. Ct. 72 (1990) 8, 14, 15

Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990) 10, 11, 15, 22, 24, 25

In re Life Ins. Co. of North America, 857 F.2d 1190 (8th Cir. 1988) 13

Iron Workers Pension Fund v. Terotechnology, 891 F.2d 548 (5th Cir. 1990), cert. denied, 110 S. Ct. 3272 (1990) 14

Local Union 598, Plumbers & Pipefitters Industry Journeyman & Appentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir. 1988), aff'd mem., 488 U.S. 881 (1988) 14, 23

Mackey v. Lanier Collections Agency & Serv., Inc., 486 U.S. 825 (1988) 9, 10, 22, 24, 25

Contents

Page

Matter of Dyke, 943 F.2d 1435 (5th Cir. 1991) 13

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 12

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)..... .....8, 12, 13

Salomon v. Transamerica Occidental Life Ins. Co., 801 F.2d 659 (4th Cir. 1986) 13

Savings & Profit Sharing Fund of Sears Employee v. Gago, 717 F.2d 1038 (7th Cir. 1983)..... 13

Settles v. Golden Rule Ins. Co., 927 F.2d 505 (10th Cir. 1991) 12

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 25, 26, 29

Standard Oil Co. of Cal. v. Agsalud, 633 F.2d 760 (9th Cir. 1990), aff'd mem., 454 U.S. 801 (1981)..... 13

Straub v. Western Union Tel. Co., 851 F.2d 1262 (10th Cir. 1988) 13

Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978) 13

Statutes Cited:

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, et seq.....passim

Contents

Page

National Apprenticeship Act of 1937 (the "Fitzgerald Act"), 26 U.S.C. § 50 (1988) 6, 26, 27, 28

28 U.S.C. § 1254 7

Minnesota Statute § 326.48 2

United States Constitution Cited:

Supremacy Clause, Article VI, clause 2 2

Rules Cited:

Minn. R. §§ 5230.0040-5230.0110 2

Minn. R. §§ 5230.0250-5230.1270 23

Other Authorities Cited:

Black's Law Dictionary 9

29 C.F.R. § 29.1(K) 28

29 C.F.R. § 29.10(a) 29

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 939 F.2d 632.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is published at 939 F.2d 632 (July 29, 1991). The decision of the United States District Court for the District of Minnesota is published at 735 F. Supp. 1434 (April 27, 1990). The Report and Recommendations of the United States Magistrate, rendered on March 30, 1990, were not published.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause, Article VI, clause 2 of the United States Constitution; the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1003(a), 1144(a), and 1144(d); Minnesota Statutes § 326.48, and Minnesota Rules §§ 5230.0040 to 5230.0110.

STATEMENT OF THE CASE[1]

This case arises out of the avowed efforts of the State of Minnesota to regulate the training of pipefitter apprentices, including training provided as a benefit by ERISA welfare plans. Respondents provide on-the-job training benefits to their apprentice employees through employee benefit plans which are governed by ERISA. The State of Minnesota has adopted a rule

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1. Respondents object to Petitioners' Statement of Facts regarding the need, purpose and effect of the apprentice journeyman ratio rule in dispute in this case and the development and operation of apprentice training programs in Minnesota. Finally, Respondents note that Petitioners seek certiorari of the denial of Petitioners' motion for summary judgment and the factual assertions in Respondents' affidavits were assumed to be true. Petitioners' Appendix (hereinafter referred to as "Pet. App.") at p. 39a. Accordingly, the facts contained therein, and not the Petitioners Statement of the Facts, must be accepted as the facts of this case.

which is intended to directly regulate these apprentice training plans, including how and to whom the training is provided. The Eighth Circuit struck down the Minnesota rule on the grounds it is preempted by ERISA. There is no reason for the Supreme Court to review this decision which is a straightforward application of well-settled ERISA preemption principles.

Respondents all have comprehensive apprenticeship training programs for their high pressure pipefitter apprentice employees. These comprehensive training programs provide both on-the-job training and formal classroom instruction. The benefit these plans provide is training which includes on-the-job instruction by more experienced employees who are licensed pipefitters. On-the-job training is a critical part of Respondents' training programs. Historically, Respondents determined the ratio of journeymen to apprentice pipefitters on each pipefitting jobsite on a project by project basis.

On January 22, 1990, the Minnesota Department of Labor and Industry ("Department"), by order of the Department's Commissioner ("Commissioner") adopted a new rule which, for the first time, established a 3:1 (ratio of licensed pipefitters to pipefitter apprentices on all high-pressure piping job sites in Minnesota (the "Minnesota rule").[2] The rule is not, as Petitioners claim, a benign "jobsite ratio," which is integral to the licensing, but not the training, of pipefitters. The clear and stated purpose of the rule is to regulate the training of pipefitter apprentices in

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2. The new rule is unprecedented in Minnesota and is unique to the entire United States. Minnesota is one of only five states in the nation which even licenses high-pressure pipefitters. Only one other state in the nation imposes any ratio, and that state, New Mexico, permits three apprentices per journeyman. The ratio of licensed pipefitters to pipefitter apprentices on a given jobsite has never been regulated by the state, but has instead always been left to the employer, or to collective bargaining.

Minnesota. *See* Pet. App. at pp. 78a-79a. This controversy concerns the Department's authority, in light of federal ERISA preemption standards, to regulate the manner in which apprentice pipefitters are trained by employers who provide training benefits in the context of employee welfare benefit plans governed by ERISA. The district court explicitly recognized that "the 3-to-1 rule is an effort by Minnesota to regulate the training of apprentice pipefitters and will necessarily affect pipefitter training programs." Pet. App. at p. 24a. The Eighth Circuit also concluded the purpose of the rule is to regulate training, and succinctly stated, "[t]his case arises out of the efforts of the State of Minnesota to regulate the training of pipefitter apprentices." Pet. App. at p. 3a. Thus, while Petitioners desperately attempt to portray the rule as pertaining to occupational licensing, in fact this controversy turns on the question of the state's power to regulate ERISA training plans.

Petitioners have agreed that Respondents' pipefitter apprenticeship training programs are "employee welfare benefit plans" as defined by ERISA, as they must since the ERISA definition of an employee welfare benefit plan specifically includes "apprenticeship or other training programs." 29 U.S.C. § 1002(1). Accordingly, at each level of judicial review the question in this case has been relatively simple: whether the state can impose the ratio rule, which "relates to" the ERISA benefit plans of Respondents (and other employers), in light of tha broad sweep of ERISA preemption which is intended to make ERISA plans exclusively ~~a federal~~ concern.

Both the district court and the Eighth Circuit have, in fact, expressly recognized that the rule does directly affect the terms and conditions of Respondents' ERISA plans. In its opinion, the district court explicitly acknowledged this substantial impact in finding that the rule "limits the number of participants in the training program and affects how training can be done. It also

imposes higher cost on plan administrators who must hire more journeymen to supervise their apprentices . . . it does affect the form and amount of training received by each participant." Pet. App. at pp. 27a-30a.

In determining the rule was preempted, the Eighth Circuit held that the rule sought to and did materially affect Respondents' ERISA training plans: "[T]he minimum jobsite ratio directly affects an ERISA plan: it regulates, and was clearly intended to regulate, certain terms and conditions of apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters." Pet. App. at p. 12a.

Despite Petitioners' exaggerated claims, this is a straightforward case in which the Eighth Circuit applied ERISA's clear statutory mandate and well-settled legal precedent to preempt a state law which directly relates to employee welfare benefit plans governed by ERISA.

SUMMARY OF ARGUMENT

Petitioners seek review of the Eighth Circuit's decision below on fundamentally three grounds. First, Petitioners contend that the Supreme Court should grant review to resolve an alleged conflict among the decisions of this Court and purported confusion among the circuit courts as to whether ERISA preempts generally applicable state statutes which are traditional exercises of state police power. Petitioners suggest that generally applicable state statutes and state statutes which do not require the creation of an ERISA plan are not preempted by ERISA. In fact, there is no conflict among the decisions of the Supreme Court and no confusion or uncertainty on the part of the circuit courts concerning the scope of ERISA preemption. Moreover, the arguments advanced by Petitioners are not new. On the contrary,

these theories were asserted years ago and have been uniformly and consistently rejected by the Supreme Court and the circuit courts. The uniformity with which this Court and the circuit courts have articulated and applied the well-settled principles of ERISA preemption conclusively establish that there is no need to review the Eighth Circuit's decision in this case.

Second, Petitioners argue that the Eighth Circuit incorrectly applied existing legal precedent in concluding that the rule is preempted by ERISA. While Petitioners seeks to justify their claims through the use of inflated rhetoric, the Eighth Circuit's decision is an application of established preemption principles to a rule which is clearly preempted under the ERISA preemption standards anticipated by this Court. The Eighth Circuit concluded that the rule before it was intended to regulate and did regulate the terms and conditions of Respondents' ERISA plans after carefully analyzing applicable ERISA preemption precedent from the Supreme Court and the circuit courts. Therefore, the decision below is not a departure from, or in conflict with, established legal precedent in the area of ERISA preemption, but instead represents a proper application of these principles to the case before it.

Finally, Petitioners argue that the state law at issue here is saved from preemption by the existence of a federal statute, the Fitzgerald Act. A cursory glance at the Fitzgerald Act reveals the frivolous nature of this argument. First, the Fitzgerald Act is inapplicable to Respondents' ERISA plans. Second, the Fitzgerald Act is only four sentences in length and has no substantive, provisions at all. It is simply a general policy statement acknowledging the benefits of apprentice programs. The Act was enacted some 37 years before ERISA and cannot be viewed as a congressional limitation on the scope of ERISA. Neither the Fitzgerald Act, nor the federal regulations promulgated under it establish any substantive regulations or mandate a specific ratio

of apprentices to journeymen for apprenticeship training programs. While the state may serve as an agent for the federal government in verifying compliance with certain federal standards in registering apprenticeship training programs with the United States Department of Labor, nothing in the federal law even hints at the ratio rule which is at issue here. Therefore, where, as here, the state imposes as a matter of state law requirements not mandated by federal law, those requirements are subject to preemption. The federal exemption argument made by Petitioners is therefore without merit.

REASONS FOR DENYING THE WRIT[3]

A. The Supreme Court Has Articulated a Clear Standard for ERISA Preemption.

Section 514(a) of ERISA provides, in relevant part, that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a) (1985). ERISA defines employee welfare benefit plans as any ERISA "plan, fund or program" providing "apprenticeship or other training programs." 29 U.S.C. § 1002(1). The United States Supreme Court has taken a broad and expansive view of ERISA's preemptive effect. The United States Supreme Court has, time and time again, and with remarkable consistency, held that ERISA preempts all state laws which "relate to"

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3. The following section sets forth the substantive reasons why the petition should be denied. As a threshold matter, however the procedural posture of the case does not lend itself to review. The decision of the Eighth Circuit does not represent a final judgment in this case. The district court granted Petitioners' motion for summary judgment. The Eighth Circuit reversed that decision. A final judgment has not been entered in the district court. In cases in which judgment is not final, this court has generally not exercised its appellate jurisdiction under 28 U.S.C. § 1254. Accordingly, the Court should decline to review this case.

employee benefit plans.

The "relates to" language of Section 514(a) is so broad that it has been recognized as an example of the maximum extent of federal preemption. *See Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). The United States Supreme Court has further recognized that the ERISA preemption clause is "conspicuous for its breadth" and "establishes as an area of exclusive federal concern the subject of every State law that 'relate(s) to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). The principle that the broad scope of ERISA preempts all state laws which "relate to" employee benefit plans has been so frequently enunciated by this Court and the circuit courts that it is now "black letter law." *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *General Elec. Co. v. New York State Dept. of Labor*, 891 F.2d 25 (2nd Cir. 1989), *cert. denied*, 110 S. Ct. 2603 (1990); *Hydrostorage Inc. v. Northern Cal. Boilermakers Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir, 1989), *cert. denied*, 111 S. Ct. 72 (1990). It is this "black letter law" that the Eighth Circuit properly applied in this case.

In *Shaw v. Delta Air Lines, Inc,*, 463 U.S. 85 (1983), the Supreme Court's most significant decision in this area, the Court carefully articulated the scope and limits of ERISA preemption. At issue in *Shaw* were two New York state statutes of general application. The laws did not directly affect the administration of employee benefit plans, but they did regulate eligibility for and participation in such plans. In *Shaw*, the Supreme Court held that ERISA preempts not only statutes which expressly conflict or compete with the provisions of ERISA, but it also preempts those statutes which do not conflict with ERISA, and even statutes which address issues not covered by ERISA at all, if these state

laws "relate to" ERISA benefit plans.

In reviewing the scope of § 514(a)'s preemption of all state laws which "relate to" ERISA plans, the Supreme Court first noted that the scope of a federal law's preemption of a state statute is determined by ascertaining congressional intent in enacting the federal law at issue. Looking first to congressional intent as reflected in the language of ERISA's preemption clause, the Supreme Court applied the *Black's Law Dictionary* definition of "relate," and refused to accept the claim (made again now by Petitioners) that the "relate to" phrase should be narrowly interpreted: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97 (footnotes omitted) (citations omitted). The Supreme Court then expressly rejected the argument that ERISA preempted only state laws which deal with the specific subject matter regulated by ERISA.

In 1988, the Supreme Court reiterated the ERISA preemption principles enunciated in *Shaw*. In *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825 (1988), the Court held that state statutes which, like the rule in the instant case, are specifically designed to affect ERISA employee welfare benefit plans are subject to ERISA preemption without the need for any further analysis. *Id.* at 829-830. The state law at question in *Mackey* was a state garnishment statute of general applicatlon that contained an express exception for monies held in an employee benefit plan. The Court held that the statute's provision which *exempted* ERISA plan funds from the effect of the statute was preempted because it was "designed to affect" employee benefit plans. The Court stated that, " . . . since our decision in *Shaw* . . . we have virtually taken it for granted that state laws that are 'specifically designed to affect employee benefit plans' are preempted under § 514(a) . . . ." The Court further stated that, "The pre-emption provision [of § 514(a)] . . . displace[s] all state laws that fall within its sphere,

even including state laws that are consistent with ERISA's substantive requirements . . . legislative 'good intentions' do not save a state law within the broad preemptive scope of § 514(a)." *Id.* (internal citations omitted). The *Mackey* standard of ERISA preemption, which requires even less analysis than the "relates to" standard, applies to any state law which expressly references to an ERISA plan, or is specifically designed to effect an ERISA plan. *Mackey* does not displace or narrow the *Shaw* "relates to" standard; instead it simply provides an alternative threshold analysis for state laws that are clearly preempted on their face because they make reference to or are designed to affect ERISA plans.

In the 1990 Term, the Supreme Court once again applied the *Shaw* and *Mackey* preemptions standards in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), and in *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990). In *Ingersoll-Rand*, as it has so often done in the past, the Court reaffirmed the basic principle of ERISA preemption articulated in *Shaw* and refined in subsequent cases. In striking down a Texas employment discharge provision on the grounds it was expressly preempted by ERISA, the Court reiterated that the "relates to" standard established in *Shaw* is the basic principle of ERISA preemption. The Court also recognized and then applied the ERISA preemption standard articulated in *Mackey*: state laws which make reference to or which are specifically designed to affect employee benefit plans are preempted under Section 514(a) of ERISA. The Court explicitly acknowledged that while the statute at issue in *Mackey* did not regulate the terms or conditions of ERISA-covered plans, the statute was nonetheless preempted because the state statute made reference to employee benefit plans. The Court also emphasized that preemption occurs "even if the law is not specifically designed to affect such plans, or the affect is only indirect." 111 S. Ct. at 483.

In *Ingersoll-Rand* the Court further held that one of the paramount purposes of the ERISA preemption statute is to prevent inconsistent or conflicting state regulation of ERISA plans. The Court reasoned as follows:

> . . . Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize administrative and financial burden of complying with the conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. Allowing state actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through Section 514(a). Particularly disruptive is the potential for conflict in substantive law . . . . Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

Id. at 484 (citations omitted).

The well-settled principles of ERISA preemption were similarly articulated in *FMC Corp. v. Holliday,* 111 S. Ct. 403 (1990). The Court reiterated that state laws of general application, as well as those laws specifically designed to affect employee benefit plans, must give way before ERISA's broad preemptive scope. "We made clear in *Shaw v. Delta Airlines, supra,* that a law relates to an employee welfare plan if it has 'a connection with or reference to such a plan' " and, "we have not hesitated to apply ERISA's preemption clause to state laws that risk subjecting plan administrators to conflicting state regulations." *Id.* at 407-408.

The essential rationale which was initially articulated by *Shaw* and which continues to be the law is clear: to achieve Congress' purpose, ERISA's broad preemptive scope must be read to preempt all state laws which directly or indirectly relate to, (even if not in conflict with), ERISA plans, including state laws of general application. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

B. The Circuit Courts Have Uniformly Adhered to the Supreme Court Standards of Broad ERISA Preemption.

The circuit courts have consistently applied the ERISA preemption principles enunciated by the United States Supreme Court. A survey of the circuit court decisions reveals no confusion or uncertainty. On the contrary, there is remarkable consistency in the application of ERISA preemption law to a wide variety of state laws, rules and regulations. The circuit courts have properly followed the Supreme Court by holding that the broad scope of ERISA preempts generally applicable statutes, preempts laws which are traditional exercises of state police power, and is not limited in scope to only those state laws which are intended to directly effect ERISA plans. *See Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991) (ERISA preemption of state "abuse of rights" doctrine, a law of general application); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir. 1991) (ERISA preemption of state wrongful death law); *Blue Cross & Blue Shield v. Dept. of Banking*, 791 F.2d 1501 (11th Cir. 1986) (ERISA preemption of state law of general applicability — Unclaimed Property Act); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), (". . . we made clear that to avoid preemption it is not sufficient that the state statute represent the exercise of a traditional police power."), *aff'd mem.*, 477 U.S. 901 (1986).

The uniformity with which the Supreme Court's ERISA preemption principles have been applied is readily demonstrated

The *Shaw* "relates to" test has been explicitly adopted by the First, Third, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits. *See, e.g., Wadsworth v. Whaland*, 562 F.2d 70, 76-77, n. 31 (1st Cir. 1977), *cert. denied*, 435 U. S. 980 (1978); *FMC Corp. v. Holliday*, 885 F.2d 79, 85 (3rd Cir. 1989), *vacated on other grounds*, 111 S. Ct. 403 (1990); *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 661 (4th Cir. 1986); *Matter of Dyke*, 943 F.2d 1435, 1447 n. 31 (5th Cir. 1991); *Authier v. Ginsburg*, 757 F.2d 796, 799 (6th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985); *Savings & Profit Sharing Fund of Sears Employee v. Gago*, 717 F.2d 1038, 1040 (7th Cir. 1983); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262 (10th Cir. 1988); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1242-45 (11th Cir. 1989). The Eighth Circuit, in a long line of cases, likewise has held that ERISA preempts state laws, including generally applicable state laws, which directly or indirectly "relate to" employee benefit plans. *See, e.g., Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-15 (8th Cir. 1981), *cert. denied*, 454 U. S. 988 (1981); *Baxter v. Lynn*, 888 F.2d 182, 185 (8th Cir. 1989); *In re Life Ins. Co. of North America*, 857 F.2d 1190, 1194 (8th Cir. 1988).

While the Second and Ninth Circuits at one time seemingly articulated a more stringent preemption standard, these circuit courts have now abandoned that standard and have applied the Supreme Court mandated "relates to" test. *See Howard v. Gleason Corp.*, 901 F.2d 1154, 1157 (2nd Cir. 1990); *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414, 416 (9th Cir. 1990). The Supreme Court, and every circuit court, uniformly agree that state laws which, directly or indirectly, regulate the terms or conditions of ERISA plans, including laws of general application, are preempted. *See Shaw*, 463 U.S. 85 (1983); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760 (9th Cir. 1990), *aff'd mem.*, 454 U.S. 801 (1981); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *General Electric Co. v. New York Dept. of Labor*, 891 F.2d 25 (2d Cir.

1989), *cert. denied,* 110 S. Ct. 2603 (1990); *Iron Workers Pension Fund v. Terotechnology,* 891 F.2d 548 (5th Cir. 1990), *cert. denied,* 110 S. Ct. 3272 (1990); *Holland v. Burlington Indust., Inc.,* 772 F.2d 1140 (4th Cir. 1985), *aff'd mem.,* 477 U.S. 901 (1986), and *cert. denied,* 477 U.S. 903 (1986).

These same principles of ERISA preemption have been specifically applied to state laws regarding apprentice training programs. The Ninth Circuit has on three occasions preempted laws dealing directly with apprenticeship training programs in the two cases that have come before this Court, the Court affirmed one decision and declined to review the other, thus demonstrating that the Eighth Circuit properly found the Minnesota rule is preempted by ERISA. In *Local Union 598, Plumbers & Pipefitters Industry Journeyman & Appentices Training Fund v. J. A. Jones Construction Co.,* 846 F.2d 1213 (9th Cir. 1988), *aff'd mem.,* 488 U.S. 881 (1988), the Ninth Circuit invalidated a state "prevailing benefit" law applicable to apprentices, concluding that it related to, and purported to regulate the terms of, appellants' apprenticeship training programs. The court noted that ERISA's preemption provision is so broad as to be "virtually unique," and that "[s]tatutes regulating contributions to ERISA plans have consistently been held preempted." *Id.* at 1218. It also rejected the defense that the state law was an exercise of traditional police power, noting that to escape preemption the law "must also affect the plan 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan.' " *Id.* at 1221 (quoting *Gilbert,* 765 F.2d at 327, and *Shaw,* 463 U.S. at 100, n. 21).

Subsequently, in *Hydrostorage Inc. v. North California Boilermakers Local Joint Apprenticeship Committee,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* 111 S. Ct. 72 (1990), the Ninth Circuit struck down a California law which required Hydrostorage, a company that had no ERISA plan, to participate in an apprentice

training program and conform to certain journeyman-apprentice jobsite ratios. The Ninth Circuit applied the *Shaw* principles to preempt the state-mandated apprentice ratio rule. The legal conclusion reached in *Hydrostorage*, a case which this Court declined to review, has direct applicability here: ratio requirements for apprenticeship training programs are not free from preemption as "local concerns" or traditional exercises of police power, but relate to and regulate ERISA plans, and are therefore preempted by ERISA. Just as the employer who had no ERISA plan could not be compelled by a state to adopt a training ratio, so too, Respondents cannot be compelled by Minnesota to adopt such a ratio as part of their ERISA plans.

Finally, in *Electrical Joint Apprentice Committee v. McDonald*, Nos. 90-15095, 90-15395, 1991 WL 227779 (9th Cir. Nov. 8, 1991),[4] the Ninth Circuit once again invalidated on ERISA preemption grounds a state law which related to apprenticeship training programs. In reaching its conclusion, the circuit court both applied *Hydrostorage* and invoked the Eighth Circuit decision in this case as supporting authority.

Thus, the Supreme Court and the circuit courts have carefully developed a uniform body of ERISA preemption law in which *Shaw* is the keystone. Clarity and consistency, not confusion and consternation, mark this area of the law. The Supreme Court reaffirmed these basic principles and the underlying rationale for ERISA preemption in *Ingersoll-Rand* and *Holliday* in the 1990 Term. More specifically, the decisions in *McDonald*, *Hydrostorage*, *J.A. Jones* and the decision in this case demonstrate

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4. The state law at issue in *McDonald* was a prevailing wage statute applicable to all contractors on public works projects which provided exceptions for certain apprenticeship programs, but not for other programs. The court concluded that the law required sponsors of ERISA apprenticeship programs to comply with state imposed standards, and thus the law was preempted.

that both the Ninth Circuit and the Eighth Circuit — the only circuit courts which have carefully addressed ERISA preemption principles in the context of state laws relating to apprenticeship training programs have reached uniform and consistent conclusions based on the same, well-settled ERISA preemption principles established by this Court in *Shaw* and its progeny.

C. The Eighth Circuit Properly Applied Well-Settled ERISA Preemption Standards to the Preempt Rule.

The parties have stipulated, and the district court and the Eighth Circuit found, that Respondents' apprenticeship training programs are "employee welfare benefit plans" falling within the scope of ERISA. Therefore, the only question presented to the Eighth Circuit in this case was whether the rule's ratio requirement "relates to" Respondents' apprenticeship training programs.

Minnesota's rule is not a law of general application which affects the entire population. Rather, Minnesota's rule applies only to on-the job training of high pressure pipefitter apprentices. The rule is intended to, and does regulate and establish certain standards for on-the-job training of apprentice pipefitters. Since on-the-job training is a benefit governed by ERISA, and since the rule requires Respondents to change their plans to conform to the state-mandated ratio, it is both expressly directed toward, and specifically designed to affect Respondents' employee benefit plans. It is therefore clearly preempted by ERISA.

The Eighth Circuit recognized the purpose and effect of the rule in reaching the conclusion that the rule was preempted by ERISA:

> "We conclude that the minimum jobsite ratio rule "relates to" employee benefit plans covered by ERISA, that is, plaintiffs' apprenticeship

> programs, within the meaning of ERISA's Section 514(a). *See Hydrostorage*, 891 F.2d at 729-31. The minimum jobsite rule was specifically designed to affect employee benefit plans. The very purpose of the minimum jobsite ratio rule was to require plaintiffs and other employers to train their apprentices in accordance with the minimum jobsite ratio rule. Application of the minimum jobsite ratio rule would also have exposed plaintiffs and other employers to conflicting or inconsistent state and local regulations. "[W]here a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' [the Supreme Court has] applied the preemption clause to insure that benefit plans will be governed by only a single set of regulations."

See Pet. App. at pp. 10a-11a (citations omitted).

Petitioners' hyperbolic claim that the Eighth Circuit's decision represents a radical extension of established preemption principles is not borne out by either the facts of this case or the Eighth Circuit's decision. In reaching its decision, the Eighth Circuit acknowledged the distinction between an employee benefit plan and a "benefit," a distinction critical to the Supreme Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Then, the Eighth Circuit explicitly recognized and applied the ERISA preemption standards established by the Supreme Court in *Shaw*, and it fully recognized the proper limits on ERISA preemption. Pet. App. at pp. 8a-9a. Thus, the legal framework in which the Eighth Circuit analyzed the rule is, without question, squarely within established precedent.

The Eighth Circuit's application of these legal principles to the rule further demonstrates that its decision is consistent with,

not a departure from, existing case law. In reaching the conclusion that the rule "relates to" employee benefit *plans* covered by ERISA, and not merely benefits, the Eighth Circuit emphasized that the rule "was specifically designed to affect employee benefit plans." Pet. App. at p. 11a. The very purpose of the rule, the Eighth Circuit concluded, was to regulate the manner in which Respondents and other employers trained their apprentices in training programs undisputedly covered by ERISA. In addition, the Eighth Circuit found that the rule would have exposed Respondents and other employers to conflicting or inconsistent state and local regulations, the very evil which the Supreme Court has recognized as one of the underlying purposes served by broad preemption. In recognizing this important purpose of ERISA preemption, the Eighth Circuit relied on and applied the rationale stated in this Court's decision in *Shaw* and followed in *Holliday*. *See* Pet. App. at p. 11a.

Petitioners suggest the Eighth Circuit ignored the limits of ERISA preemption. This claim, like petitioners' other rhetoric, finds no basis in the court's decision. In fact, the Eighth Circuit carefully considered this very question in light of applicable Supreme Court precedent. The Eighth Circuit, citing *Shaw*, articulated the proper limits of ERISA preemption, acknowledging that the ratio rule would not be preempted if it affected respondents' apprenticeship programs in "too tenuous, remote, or peripheral a manner to warrant a finding that the [rule] 'relates to' the plan[s]." *See* Pet. App. at p. 8a. Clearly, the Eighth Circuit understood the proper limits of ERISA preemption, and it correctly applied these principles in concluding that:

> We agreed that the minimum jobsite ratio rule is an exercise of traditional state regulatory power over occupational training. *However, we cannot agree that its effect on the apprenticeship programs is so tenuous, remote or peripheral to allow us to*

> *conclude it does not "relate to" them.* The minimum jobsite ratio rule directly affects an ERISA plan; it regulates, and was clearly intended to regulate, certain terms and conditions of the apprenticeship programs by establishing the manner in which employers can train and employ both journeymen and apprentice pipefitters.

See Pet. App. at p. 12a (emphasis added). Accordingly, while the Eighth Circuit acknowledged petitioners' claim that the ratio rule was "an occupational training requirement," the rule nevertheless "related to" respondents' training plans, and therefore was preempted. *Id.*

The Eighth Circuit's decision represents a straightforward application of ERISA preemption principles. It does not signify conflict among the circuit courts in this area of the law. On the contrary, the Eighth Circuit's decision falls squarely within well-established precedent and demonstrates the uniformity with which the Supreme Court, the circuit courts and, specifically, the Eighth Circuit have developed and applied ERISA preemption law. Therefore, review of the Eighth Circuit's decision by this Court is not warranted.

D. Petitioners Have Mischaracterized the Legal Standards of ERISA Preemption, and Have Failed to Demonstrate Any Justification for Granting the Petition.

In their desperate attempt to create an issue worthy of this Court's consideration, petitioners have resurrected arguments to limit the scope of ERISA preemption which were long ago rejected by this Court and the circuit courts. For well over a decade the Supreme Court and the circuit courts have consistently rejected the notion that ERISA preemption does not extend to traditional exercises of police power, that ERISA, preempts only state laws

which regulate ERISA plans and does not preempt laws of general applicability, that laws which directly affect ERISA plans are preempted while those which indirectly affect ERISA plans are not, and that the purpose of a state law determines whether it is preempted by ERISA. Based on this sound and well-settled authority, petitioners' arguments must fail.

1. The Eighth Circuit's Decision Does Not Destroy the State's Regulatory Authority by Improperly Limiting the Exercise of Traditional Police Power.

Petitioners claim the Eighth Circuit failed to recognize the "constitutional balance between the states and the federal government," and thus erroneously extended ERISA preemption into an area of state regulation. Petitioners' Brief (hereinafter referred to as "Pet. Brief") at p. 9. The Supreme Court and the circuit courts have carefully considered and have already resolved the balance between the broad sweep of ERISA preemption and traditional state regulatory power. In *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981), the Supreme Court rejected the same objections raised here to ERISA preemption — a traditional exercise of police power; a law relating only indirectly to ERISA plans; a law intended to protect the interests of citizens of a state. In *Alessi*, the Court reviewed a New Jersey workers' compensation law. In this case, its first analysis of ERISA preemption, the Supreme Court began by resolving the same concern which petitioners now raise, some ten years later, that ERISA preemption "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Id.* at 522. The Supreme Court unanimously held the state law governing workers' compensation awards, "which obviously are subject to the State's police power," was preempted by ERISA because the law at least indirectly "related to" plans governed by ERISA. *Id.* at 524.

As the Supreme Court made clear in *Alessi*, the question is not the purpose of the state law, but whether its application relates to an ERISA plan: " *Whatever the purpose or purposes of the New Jersey statute,* we conclude it relate[s] to pension plans governed by ERISA . . . "

> *It is of no moment that New Jersey intrudes indirectly,* through a workers' compensation law rather than directly, through a statute called "Pension Regulation." *ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern* . . . . ERISA's authors clearly mean to preclude the State's from avoiding through form the substance of the preemption provision.

Id. at 524-25 (emphasis added). Therefore, the Minnesota rules' alleged goal of regulating occupational training provides no defense to ERISA preemption, even if it falls within an area traditionally reserved to the states.

Petitioners seek to justify their claim that the entire regulatory scheme of state government will collapse as a result of this decision by alleging that the rule is a law of "general application." Petitioners purport that, "If the state law *applies generally,* then it does not have a 'connection with or reference to' ERISA plans and is *not preempted,"* Pet. Brief at p. 19 (emphasis added). In fact, the rule is not a law of "general application." Furthermore, petitioners' analysis has no basis in the law and is exactly contrary to the clearly stated decisions of this Court.

In *Shaw*, the Supreme Court considered whether ERISA preempts only laws which are specifically designed to affect or directly affect employee benefit plans. The Court confirmed that laws of general application, and statutes which address matters

not covered by ERISA at all, are preempted by the broad scope of ERISA preemption. *Shaw*, 463 U.S. at 96-100. In *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988), the Court again emphasized that the preemption provision of ERISA displaces "all state laws" falling within its sphere, and that "legislative good intentions" do not save a state law within the scope of ERISA preemption. *Id.* at 829-830. The Court reiterated in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), that even if a law is not specifically intended to regulate ERISA plans, or even if the effect is only indirect, a law is nevertheless preempted if it "relates to" an employee benefit plan. *Id.* at 483. The circuit courts, like the Supreme Court, have consistently held that state laws of general application which are admittedly traditional exercises of police power are nevertheless preempted if they relate to an ERISA plan. Neither this rule nor the Eighth Circuit's decision present any new questions concerning either the issue of federalism or the scope of ERISA preemption which justify granting the petition.

2. There is No Regulatory Black Hole.

Petitioners, in a desperate attempt to demonstrate this case warrants Supreme Court review, predict the Eighth Circuit's decision will create "a regulatory black hole of mammoth proportions." Pet. Brief at p. 15. This argument, a blatant attempt to raise hysteria by alleging the collapse of state regulations, is without merit. The Eighth Circuit's decision does not implicate, and respondents have not challenged, the authority of Minnesota to license pipefitters or any other occupation.[5] The Eighth Circuit,

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5. Petitioners would have the Court believe that Minnesota's licensing system and its regulatory structure for high pressuring piping are "in jeopardy" by the decision of the Eighth Circuit in this case. Pet. Brief at p. 10. These assertions are false. The new rule does not affect the ability of the Department to license pipefitters, and the Eighth Circuit's invalidation of the rule does not

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in concluding the Department acted impermissibly in attempting to regulate ERISA plans, did not destroy the state's power to license occupations, nor did it, as petitioners claim with their vastly inflated rhetoric, "sweep away all state laws that protect employees . . . ." Pet. Brief at p. 15.

Petitioners' claim that the Eighth Circuit's decision will destroy traditional state and local government police power flies in the face of scores of federal court decisions which have preempted state regulations under ERISA. For example, there is no evidence to support, or any reason to believe, that the Supreme Court's decision in *Shaw*, which preempted certain antidiscrimination statutes, destroyed the power of New York to enact and enforce antidiscrimination legislation. Similarly, the decision of the Ninth Circuit in *J.A. Jones*, which invalidated a state prevailing wage law relating to apprenticeship programs, did not destroy the ability of California to enact and enforce labor legislation or prevailing wage laws. And the Supreme Court's decision in *Alessi*, which invalidated a state law concerning the integration of workers' compensation awards and private pension plan benefits, did not preclude New Jersey from enacting and enforcing workers' compensation laws. If ERISA preemption did in fact pose such a dire threat to the traditional exercise of state police power, then this police power would have collapsed long

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undermine the Department's comprehensive regulatory scheme for licensing pipefitters or controlling the installation and operation of piping work in Minnesota. The installation and operation of high-pressure piping is subject to the detailed requirements of Minnesota's Power Piping Code, Minn. R. §§ 5230.0250-5230.1270, and the oversight of the Code Enforcement Division of the Department. The Code Enforcement Division must review and approve the plans for each proposed high pressure piping installation, issue a permit for the installation work before any work may begin and inspect the pipefitting work performed throughout the installation process. Then the entire piping system is subject to a final inspection.

ago with the enactment of ERISA preemption. Obviously, this has not occurred. Far from leaving a regulatory black hole, the Eighth Circuit's decision has simply prevented the Department from improperly intruding into the regulation of ERISA plans.

3. Petitioners Have Misstated the Law and this Court's Decision in an Attempt to Create a New Legal Structure for ERISA Preemption.

In their zeal to demonstrate the significance of this case, Petitioners have distorted and misstated ERISA preemption principles and the holdings of this Court in several decisions. Purporting to rely on *Mackey*, *Ingersoll-Rand*, and *Fort Halifax*, Petitioners have created, out of whole cloth, a new "structure" for ERISA preemption. Petitioners claim that in *Fort Halifax* and *Ingersoll-Rand* this Court "emphasized" there are two categories of laws which are not preempted by ERISA: first, those statutes that do not require the establishment of an ongoing ERISA plan; second, those statutes which are "generally applicable" and make no reference to, or that function irrespective of, the existence of an ERISA plan. Pet. Brief at p. 20. Petitioners' analysis and purported statements of the law are simply wrong.

First, Petitioners have turned the Court's decision in *Ingersoll-Rand* on its head. The Court found the Texas statute at issue expressly referred to, and was indeed "premised on," the existence of a pension plan. Therefore, under the *Mackey* preemption standard, the law was automatically subject to preemption. *Mackey* and *Ingersoll-Rand* stand for the proposition that state laws which make reference to ERISA plans are preempted without the need for any further analysis. *See Mackey*, 486 U.S. at 829-830; *Ingersoll-Rand*, 111 S. Ct. at 483.

While *Ingersoll-Rand* made it clear that state laws which make reference to ERISA plans are preempted, the Court did not

suggest, as Petitioners claim that ERISA *only* preempts state laws which make reference to ERISA plans. *Ingersoll-Rand* did not overrule *Shaw*, and the decision does not stand for the proposition that laws which make no reference to or function irrespective of ERISA plans are exempt from preemption. To the contrary, both *Mackey* and *Ingersoll-Rand* recognized that laws which relate to, but which may not make specific reference to, ERISA plans, are preempted under ERISA. Therefore, it is a sufficient, but not a necessary condition, for preemption that a state law make reference to an ERISA plan. As *Shaw* and its progeny have unequivocally established, a statute which makes no reference to an ERISA plan may nevertheless be preempted because it "relates to" such a plan.

Second, Petitioners' analysis of *Fort Halifax* and its implications is similarly misplaced. To suggest, as Petitioners do, that *Fort Halifax* stands for the broad proposition that state laws which do not require the establishment of an ongoing plan are not preempted by ERISA, or that ERISA preempts only laws which require creation of a plan, is a gross mischaracterization of the Court's decision. The Supreme Court did not hold, and has never held, that state laws which do not require the establishment of an ongoing ERISA plan are immune from preemption.

In *Fort Halifax*, 482 U.S. 1 (1987), the Supreme Court rejected an ERISA challenge to a Maine statute which required employers to provide a one-time severance payment to employees in the event of a plant closing. The basis for the Supreme Court's conclusion was that while the Maine statute "related to" employee *benefits*, it did not relate to the appellant's employee benefit *plan* because the appellant *had no ERISA plan*. *Id.* at 17-18. Hence, the question in *Fort Halifax* was whether the Maine statute required the appellant to *create* an ERISA plan. The Supreme Court found it did not because the obligation imposed by the

Maine statute was a *one-time* obligation which, therefore, required no continuing plan. *Id.* at 12-14. *Fort Halifax* turned on the absence of an ERISA plan rather than the failure of the statute to "relate to existing plans." Petitioners agree that *Respondents have ERISA plans*, and, unlike the statute at issue in *Fort Halifax*, it must be conceded that the rule is an ongoing requirement for apprentice training programs. Accordingly, *Fort Halifax* has no applicability to this case.[6]

Finally, Petitioners suggest that state laws which "function irrespective of" the existence of an ERISA plan and which apply to all employers are not preempted. This argument constitutes yet another misstatement of the law. The Supreme Court and the circuit courts have repeatedly held that laws which apply uniformly to employers and which are not intended to regulate ERISA plans are nevertheless preempted under the broad scope of ERISA preemption as defined by this Court in *Shaw*. Moreover, Respondents and other employers in Minnesota who train apprentice pipefitters have ERISA plans. Therefore, the ratio rule does not operate irrespective of ERISA plans. Indeed, as the Eighth Circuit concluded, the rule relates to and is intended to regulate the ERISA plans of employers who have training programs for pipefitter apprentices in Minnesota. Hence, Petitioners' argument is both flawed and wholly irrelevant for this case.

E. The Rule Is Not "Saved" by Either ERISA or the National Apprenticeship Act.

Petitioners now argue for the first time in this case that the ratio rule promulgated by the Department, is a "federal law" under the National Apprenticeship Act of 1937 (the "Fitzgerald Act")

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6. Moreover, the Supreme Court distinguished its decision in *Fort Halifax* from other cases where similar statutes were invalidated because they related to *existing ERISA plans*. *Fort Halifax*, 482 U.S. at 17-18.

26 U.S.C. § 50 (1988), and is therefore saved from preemption. Petitioners have never before raised this argument, and the Eighth Circuit did not rule on this question.[7] Therefore, the Court need not consider this issue.

As the Supreme Court stated in *Duigan v. United States*, 274 U.S. 195 (1927) "[t]his court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed below are reviewed." *Id.* at 200. *See also, GranFinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386 n. 5 (1989) (the Court declined to determine issue because Petitioner failed to assert it as a "distinct ground" for recovery and court of appeals had not passed upon issue); *Delta Air Lines v. August*, 450 U.S. 347, 362 (1981) (the Court refused to consider a question not raised in the court of appeals because it was "not properly before" the Court).

Notwithstanding their failure to raise the issue previously, Petitioners now claim that the Department must be allowed to promulgate the rule because to hold otherwise "prevents the states from doing what the Fitzgerald Act regulations require . . . " Pet. Brief at p. 27. Petitioners' arguments are disingenuous because they effectively ask the Court to ignore both the purposes and the express language of the Fitzgerald Act and ERISA.

In the first instance, the Fitzgerald Act does not even apply in this case. The Fitzgerald Act is simply a policy statement for promotion of voluntary apprenticeship programs which seek to

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7. Petitioners' only previous mention of the Fitzgerald Act before the Eighth Circuit was as a footnote to their argument that the National Labor Relations Act does not preempt substantive state regulation. Significantly, because of its holding that the ratio is preempted under ERISA, the Eighth Circuit did not rule on this question.

be registered with the United States Department of Labor for federal contracts, grants and agreements. 29 C.F.R. § 29.2(K). As Petitioners admit, Minnesota's apprenticeship registration program, which exists under authority delegated by the Fitzgerald Act, is "voluntary." Petitioners concede that "employers remain free to establish any apprenticeship or training program they please . . . " Pet. Brief at 5. The Minnesota rule, however, applies to all training programs. Indeed, Respondents have not sought to register their ERISA apprentice training plans with the State of Minnesota. Thus, the Fitzgerald Act is irrelevant to Respondents' plans and, hence, this case.

The Fitzgerald Act itself does not transform this state rule into a federal law. As noted, the Fitzgerald Act is simply a policy statement and contains no substantive requirements. The Fitzgerald Act and its regulations are not mandatory but merely voluntary and apply only to those parties who seek certification of their apprenticeship programs for federal pursposes. More importantly, under the Fitzgerald Act there are no mandator numeric ratios of apprentice to journeyman in apprentice training programs and the state is not empowered by the Act to establish such mandated ratios. Petitioners themselves have admitted that "the Fitzgerald Act contemplates *voluntary* subscription to ratios." *See, supra,* n. 7 (emphasis added). The ratio rule is clearly not a requirement of the Fitzgerald Act. Thus, preemption of the ratio rule does not "prevent Minnesota from doing what the Fitzgerald Act encourages," namely, to review apprenticeship programs for the purpose of federal certification.[8] Preemption of the rule only

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8. In addition, the state may not promulgate rules which conflict with the federal program. In *Electrical Joint Apprenticeship Committee v. Frank McDonald*, Nos. 90-15095, 90-15395, 1991 WL 227779 (9th Cir. Nov. 8, 1991).

The apprenticeship program of Respondent BE&K Construction Company is based on an Associated Builders and Contractors apprentice program which (Cont'd)

prevents the state from doing that which is prohibited by ERISA.

Finally, the ERISA savings clause provides that "[n]othing in this chapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States, . . . any rule or regulation issued under such law." 29 U.S.C. § 1144(d). On its face, the saving language applies only to *federal*, not state, laws. The rule is, without question, a state law.

Moreover, Section 514(d) is not intended to provide a general exemption from preemption, but instead explicitly provides a well defined and limited set of areas which are exempt from ERISA preemption. The ERISA savings clause does not encompass state regulations of apprenticeship training programs. As this Court stated in *Shaw*, "[t]he combination of Congress' enactment of 514(a)'s all inclusive preemption provision and its enumeration of narrow, specific exemptions to that provision militate against expanding Section 514(d) into a more general savings clause." 463 U.S. at 104. Therefore, the ERISA savings clause, by its terms and in accordance with this Court's prior interpretations of that clause, does not apply to the rule at issue here.

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has received Bureau of Apprenticeship Training approval and Respondent Boise Cascade Corporation is a signatory to a labor agreement that provides for an apprenticeship training program for apprentice employees. *See* Pet. App. at p. 44a. Thus, according to both the Fitzgerald Act, 29 C.F.R. § 29.10(a), and *McDonald*, 1991 WL 227779, at *4, the state's attempt to impose a ratio on these programs is preempted by ERISA.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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